Supreme Court, U.S.

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Case No. _____

SUPREME COURT
OF THE UNITED STATES

October 1993 Term

SHARMAN RAE McVAY,
Petitioner

v.

SAMUEL RAY PARRISH,
Respondent

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTION PRESENTED

I. The question presented is whether the bankruptcy exemption statute, 11 U.S.C. §522(f)(1) entitles a debtor to avoid the fixing of a judicial lien on an interest of exempt property, in particular, a Texas homestead.

PARTIES TO THE PROCEEDING

All parties in the Court of Appeals for the 5th Circuit appears in the caption of this petition. 28 U.S.C. §2403(a) may be applicable.

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11 U.S.C. §522(f)(1)

28 U.S.C. 1254(1)

28 U.S.C. §2403(a)

Texas Probate Code Sec. 282

OPINIONS BELOW

The United States Court of Appeals for the 5th Circuit entered an Order and opinion in this proceeding on November 15, 1993.

The ruling of the United States Court of Appeals for the 5th Circuit is reported and a copy of that opinion is appended hereto as Appendix A.

The ruling of the United States District Court for the Western District of Texas was reported and a copy of that decision is appended hereto as Appendix B.

The ruling of the United States Bankruptcy Court for the Western District of Texas was reported and a copy of that decision is appended hereto as Appendix C.

JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the 5th Circuit was entered on November 15, 1993. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

At issue in this proceeding are the following provisions:

Amendment V of the Constitution of the United States of America, which states in pertinent part as follows:

* * *

No persons shall be deprived of life, liberty, or property, without due process of law;...

Amendment X of the Constitution of the Unites States of America, which states as follows:

* * *

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The following are United States Statutes and regulations at issue in this proceeding:

11 U.S.C. §522(f)(1)

The Statute is contained in Appendix D.

STATEMENT OF THE CASE

FACTS

This Petition for a Writ of Certiorari arises from the United States Court for the 5th Circuit affirming the judgment of the United States District Court for the Western District of Texas, holding that the bankruptcy exemption statute, 11 U.S.C. §522(f)(1) entitled Respondent Parrish to avoid the fixing of a judicial lien on Parrish's separate property homestead, which lien was granted to Petitioner McVay by a Texas state district court as a part of the division of the marital property estate in a divorce proceeding.

McVay and Parrish were married March 6, 1982. On March 6, 1983, Parrish inherited unimproved real property in Freestone County, Texas, at which time McVay and Parrish lived in Dallas County, Texas. Subsequently, McVay and Parrish moved to Wortham, Texas (Freestone County) where McVay and Parrish built their marital residence on Parrish's property. The funds used to improve the land and to build their home were found to be community funds by the state court and therefore McVay, under Texas law, was granted a valid equitable (judicial) lien on McVay's

and Parrish's marital homestead with Parrish being granted a new fee simple ownership to the property and improvements.

Parrish did not appeal the Divorce Decree entered March 21, 1991, by the 87th Judicial District Court of Freestone County, Texas; rather, Parrish chose to file for Chapter 7 bankruptcy, claiming that the property subject to the judicial lien was exempt from the "fixing of a lien." At the time of filing for bankruptcy, Parrish had income of $2288 per month and expenses of $1756 per month according to schedules filed by him with the bankruptcy court, as shown in Appendix E. Also Parrish's summary of Debts and Property, Appendix F, reflected debts of $104,049.00, including the $76,500 debt to McVay, and property in the amount of $231,002.00. These documents filed by Parrish with the bankruptcy court reflected Parrish's ability to satisfy the debt and equitable lien granted to McVay by the Court, McVay's only remedy for the extinguishment of her community interest in the property awarded to Parrish by the Court.

The Court of Appeals for the 5th Circuit upheld the judgment of the Western District of Texas that McVay's judicial lien was avoidable under 11 U.S.C. §522(f)(1).

ARGUMENT

I. The Court of Appeals erroneously concludes that the bankruptcy exemption statute, 11 U.S.C. 522(f)(1) entitled Parrish to avoid the fixing of McVay's prepetition judicial lien to the property awarded to Parrish in the divorce as Parrish's interest in the property did not remain unaltered after the divorce and the divorce decree did create a new property interest for Parrish.

The validity of McVay's judicial lien is not an issue. The 5th Circuit in Note 1 of its decision stated: "...We assume for the purpose of applying §522 that an enforceable lien existed,...."

McVay acknowledges that Texas law fixes character of property as community or separate as of time of inception of title. Eggemeyer v. Eggemeyer, 554 S.W.2d 137,1240 (Tex. 1977). However, important facts have been ignored by the lower courts.

First, when the property was inherited by Parrish, McVay and Parrish did not live on the property. In fact, McVay and Parrish lived some 75 miles away in Dallas County. Second, the property was totally unimproved when inherited by Parrish. Third, community property funds were used by McVay and Parrish to build their marital home and to improve the land. Fourth, McVay and Parrish moved into the home and lived there together for

several years prior to their divorce. Fifth, at the time McVay and Parrish moved onto the now improved property, it became the homestead of McVay as well as Parish. United States v. Rodgers, 46 U.S. 677, 103 S.Ct. 2132,2138 (1983). Sixth, the real property and the community improvements attached thereto remained the homestead of McVay until the divorce decree was entered by the Court. Seventh, at the point community funds were used to improve Parrish's separate property real estate, McVay was entitled to a claim for reimbursement under state law for one-half (1/2) of the funds expended for community improvements. Wierzchula v. Wierzchula, 623 S.W.2d 730,73 (Tex Civ. App. Houston {1st Dist} 1981, no writ).

Farrey v. Sanderfoot ____U.S. ___, 111 S.Ct. 1825, 114 L.Ed. 2d 337 (1991) is distinguishable from this case in one respect. Parrish did acquire the unimproved property through inheritance in 1983 as his separate property; whereas, in Farrey, the parties held title to their property as joint tenants. However, the 5th Circuit erred in its comparison of Farrey and the facts of this case from that point. The use of community funds by McVay and

Parrish to build their home on Parrish's land burdened the property with not only McVay's right to reimbursement, but also with a homestead interest. (Rodgers).

Farrey states that "§522(f)(1) does not say that the debtor may undo a lien on an interest in property. Rather, the statute expressly states that the debtor may avoid the "fixing" of a lien on the debtor's interest in property... The statute defines this pre-existing object as an interest of the debtor in property. Therefore, unless the debtor had the property interest to which the lien attached at some point before the lien attached to that interest, he or she cannot avoid the fixing of the lien under the terms of §522(f)(1).

The judicial lien granted to McVay by the state court, like the lien in Farrey, did not attach to Parrish's pre-existing interest in the real estate, but to McVay's interest in the community improvements and her homestead interest. Since the community improvements were attached to Parrish's separate property, McVay's only remedy from the state court was the judicial lien; without the judicial lien, McVay had no way to be paid for her

interest in her marital residence. Since Parrish could not have clear fee simple title to the property without reimbursing McVay for her interest in the community improvements, the same decree that awarded Parrish his new fee simple interest in McVay's interest in the community improvements, simultaneously granted the lien to McVay. The divorce decree extinguished the homestead interest of McVay and her community one-half interest in the improvements to Parrish's separate real estate. Thus, as in Farrey, McVay's lien fixed not on Parrish's pre-existing interest, but rather on his new fee simple ownership. *In re Finch*, 130 B.R. 753 (S.D.Tex. 1991).

"The Texas Constitution gives each spouse in a marriage a separate and undivided possessory interest in the homestead, which is lost only by death or abandonment and which may not be comprised by the other spouse or by his or her heirs." Pemelton v. Pemelton 809 S.W.2d 642 (Tex. App.-Corpus Christi 1991). Until the divorce decree was entered, Parrish, under Texas law, could not make a loan on the property or sell the property without the joinder of McVay. Furthermore, if Parrish had died while still married to McVay, McVay could have lived in the house on the

property until she died or abandoned the property. Texas Probate Code §282 states as follows:

> The homestead rights of the surviving spouse and children of the deceased are the same whether the homestead be the separate property of the deceased or community property between the surviving spouse and the deceased, and the respective interests of such surviving spouse and children shall be the same in one case as in the other.

The Divorce Decree stated: "Respondent (Parrish) is awarded the following as Respondent's sole and separate property, and Petitioner (McVay) is hereby divested of all right, title, interest, and claim in and to such property: (emphasis added).

> 1. The following real property is confirmed as the separate property of Respondent, SAMUEL R. PARRISH, subject to the equitable lien of Petitioner, SHARMAN RAE PARRISH:... (emphasis added).

a. Located in Freestone County, Texas, to-wit: BEING 13.15 acres out of the R. B. Longbotham League Survey in Freestone County, Texas, Abstract No. 16, and being Tract No. 2, according to survey made of said J.J. Ferguson Estate of R. B. Longbotham League, on March 8th, A.D. 1937, by L. B. Gamewell, State Licensed Surveyor for Texas, and said Tract No. 2 being out of the 101 acre tract of said estate and described by metes and bounds, as follows:

BEGINNING in the N. line of said tract 298 vrs. E. of the N.W. corner of said tract; THENCE S. 454.2 vrs to the S.E. corner of Tract 1; THENCE E. 156.2 vrs. a stake for interior corner of Tract 3; THENCE N. 105 vrs. a stake in the E. line of said 101 acres 9.5 vrs. N. of the N. W. corner of Tract of 63.5 acres; THENCE N. 339.5 vrs. a stake for N.E. corner of said 101 acres; THENCE W. 325.5 vrs. to the place of beginning; and

BEING the land conveyed to Franke L. Parrish as a partition and division of land and premises between J. G. Longbotham, Eunice Thomson, Franke Parrish, A.L. Moody, and Margaret Hayter, as heirs at law of M. J. Ferguson, Deceased, dated March 15, 1937, and being recorded in Volume 149, Page 30, Deed Records of Freestone County, Texas;

SAVE AND EXCEPT: 4 acres off of the South of the said tract which was sold to Floyd C. Calame, by deed dated October 7, 1950, which deed appears of record in Book 213, Page 457, Deed Records of Freestone County, Texas.

There is no question that the Decree of Divorce dissolved McVay's pre-existing interest in the homestead and that her new interest, as in Farrey, was created in the divorce decree and evidenced by her judicial lien on Parrish's new interest in the property. This Court in Farrey went on to say that there would be the same result "even if the divorce decree did not extinguish the

couple's pre-existing interests, but instead merely reordered them." As in Farrey, the divorce decree in this case transferred McVay's previous interest in the property to Parrish and "again simultaneously granted a lien equal to that interest...." Also as in Farrey, Parrish would still be unable to avoid the lien since it fastened only to what had been McVay's pre-existing interest, and this interest Parrish would never have possessed without the lien being fixed.

Farrey states further: "We hold that §522(f)(1) of the Bankruptcy Code requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of the lien on that interest." Farrey at 1831.

As shown in Appendix E and F, Parrish had sufficient assets with which to satisfy McVay's lien. As stated In re Miller, 58 BR 192 (S.D.Tx. 1985): "Bankruptcy court had no authority to review State court divorce decree. This Court's jurisdiction is limited by Congress and it does not have any authority to sit as an appellate court reviewing the decisions of a State Court." The bankruptcy was filed with one purpose in mind: to take from McVay the only

significant property interest awarded to her in the Decree, the judicial lien. To permit Parrish to use 11 U.S.C. 522(f)(1) to deprive McVay of her property rights under state law violates not only good common sense, but more importantly violates McVay's constitutional rights pursuant to Amendment V and Amendment X. State law provided McVay with one remedy, and the Court awarded her that sole remedy. Yet, McVay has been unconscionably deprived of that property by the lower courts which failed to recognize that Congress primarily intended §522(f)(1) as a device to "thwart creditors, who sensing an impending bankruptcy, rush to Court to obtain a judgment to defeat the debtor's exemptions." Farrey at 1831.

McVay did not obtain her lien to defeat Parrish's pre-existing interest, but to protect her own pre-existing interest in the marital homestead.

CONCLUSION

As stated above, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the 5th Circuit.

RESPECTFULLY SUBMITTED, February 7, 1994.

Respectfully submitted,

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In the Matter of Samuel Ray PARRISH, Debtor.

Sharman Rae McVAY, Appellant,

v.

Samuel Ray PARRISH, Appellee.

No. 93-8063

Summary Calendar.

United States Court of Appeals,

Fifth Circuit.

Nov. 15, 1993.

Former wife of Chapter 7 debtor filed complaint contesting avoidance in Chapter 7 case of prepetition equitable lien imposed by Texas divorce decree to secure judgment in wife's favor against husband representing half of reimbursement to community estate for improvements husband made to land he inherited during marriage. The Bankruptcy Court, Larry E. Kelly, Chief Judge, 144 B.R. 349, allowed husband to avoid lien. Wife appealed. The United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., affirmed. Wife appealed. The Court of

Appeals held that under Texas law, property inherited by husband during marriage and prior to divorce was his separate property, and thus, lien attaching to that property pursuant to state court divorce decree was avoidable under Bankruptcy Code provision allowed debtor to avoid fixing of judicial lien on property made exempt as homestead.

Affirmed.

1. **Bankruptcy 2792**

Bankruptcy Code allows debtor to avoid fixing of judicial lien on property made exempt as homestead; protection is limited in that debtor cannot void lien on interest acquired after lien attached. Bankr.Code, 11 U.S.C.A. §§522, 522(f)(1).

2. **Bankruptcy 2792**

Prepetition equitable lien attaching to Chapter 7 debtor's interest in separate property acquired through inheritance following his marriage and securing divorce judgment in favor of former wife was avoidable in Chapter 7 proceeding pursuant to provision of Bankruptcy Code allowing debtor to avoid fixing of judicial lien on property made exempt as homestead, where debtor's separate

interest existed before divorce and continued unaltered afterwards and divorce decree did not create new property interest for debtor. Bankr.Code, 11 U.S.C.A. §§ 522, 522(f)(1), 701 et seq.

3. Husband and Wife 249(5)

Texas law fixes character of property as community or separate property as of time of inception of title.

Appeal from the United States District Court for the Western District of Texas.

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:

The parties contest the avoidance in bankruptcy of an equitable lien imposed by a Texas divorce decree. We agree with the courts below that the lien is avoidable as a judgment lien under 11 U.S.C. §522(f).

Samuel Parrish and Sharman McVay married March 6, 1982. A year later Parrish inherited a 23.15 acre tract from his mother. The parties divorced on March 21, 1991. The divorce

decree included a judgment in McVay's favor against Parrish for $76,500, representing half of the reimbursement to the community estate for improvements Parrish made to the land he inherited. This judgment was secured by an equitable lien against that land. Parrish filed for Chapter 7 bankruptcy relief on May 29, 1991. The bankruptcy court allowed Parrish to avoid the lien under 11 U.S.C. §522(f)(1), 144 B.R. 349 and the district court affirmed.

[1] Section 522(f)(1) allows a debtor to avoid the fixing of a judicial lien on property made exempt as a Texas homestead.[1] Its protection is limited in that a debtor cannot avoid a lien on an interest acquired after a lien attached. *Farrey v. Sanderfoot*, -- U.S. --, 111 S. Ct. 1825, 114 L.Ed.2d 337 (1991). *Farrey* involved a divorce decree that simultaneously ended a marital community and created a lien against one of the new separate property interests. The court reasoned that when a debtor simultaneously acquired a fee simple interest and a lien on that interest, there was no risk that

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[1]Parrish also contests the validity of the lien under Texas law. We assume for the purpose of applying §522 that an enforceable lien existed, but we express no opinion as to the merits of Parrish's contention.

the lien had been created by a creditor rushing to court in anticipation of bankruptcy. The policy behind section 522(f)(1) was not advanced by applying it under those circumstances. *Id.*, ___ U.S. at ___ _ ___, 111 S.Ct. at 1830-31. *See also In re Finch* 130 B.R. 753, 757 (S.D.Tex.1991) (reaching the same result under Texas Community property law.)

[2,3] This case is distinguishable from *Farrey* and *Finch*. Parrish acquired the property through inheritance in 1983 as his separate property. From that point on it was his separate property, as Texas law fixes the character of property as of the time of inception of title. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex.1977). Thus the decree did not create a new property interest for Parrish as did the decrees in *Farrey* and *Finch*. Since Parrish's interest existed before the divorce and continued unaltered afterwards, we find that the lien attaching to that property was avoidable under section 522.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

IN RE:	§	
	§	
SAMUEL RAY PARRISH,	§	
Bankrupt.	§	
----------	§	
	§	
SHARMAN RAE McVAY,	§	
Appellant,	§	Civil No. W-92-CA-270
v.	§	
	§	
SAMUEL RAY PARRISH,	§	
Appellee.	§	

MEMORANDUM OPINION

Came on this day to be considered the appeal of a bankruptcy Order entered by Judge Larry E. Kelly on August 24, 1992, vacating the Appellant's judicial lien as an impairment of Appellee's Texas homestead exemption.

I. Background

The Appellant, Sharman Rae McVay ("McVay"), and the Appellee, Samuel Ray Parrish ("Parrish"), were married on March 6, 1982. On March 6, 1983, Parrish inherited the real property that is the subject of this litigation. A home was subsequently constructed on this inherited land, using money from

an early termination benefit received by Parrish. On March 21, 1991, the parties were granted a Decree of Divorce by the 87th Judicial District Court of Freestone County. Pursuant to a jury verdict, the Decree of Divorce granted McVay a judgment against Parrish for $76,500.00, representing half of the reimbursement to the community estate, ordered by the trial court, for improvements made to Parrish's inherited separate property, secured by an "equitable lien" in McVay's favor against the subject real property. The jury found that the "early termination benefit" was not a previously acquired retirement account earned by Parrish, but rather community income. Parrish filed for Chapter 7 bankruptcy relief on May 29, 1991, and thereafter filed the underlying complaint against McVay to determine the dischargability of her judgment lien against him.

This Court must determine whether the bankruptcy court's "Order Avoiding Judgment Lien" should be reversed, thereby validating the equitable lien awarded to McVay in the division of community property upon the divorce of McVay and Parrish. The Order of the bankruptcy court totally nullified the effect of the

order of the state trial court; stripped McVay of court-awarded compensation for community improvements erected during the marriage upon Parrish's separate unimproved real estate; and cut off McVay's homestead interest in those improvements.

II. Standard of Review

The bankruptcy court's conclusions of law are subject to plenary review. Matter of Nobleman, 968 F.2d 483, 485, n. 5 (5th Cir. 1992); In re Delta Towers, Ltd., 924 F.2d-74, 76 (5th Cir. 1991). Its findings of fact will be upheld unless fund to be clearly erroneous. Matter of Bennett, 970 F.2d 138, 139 (5th Cir. 1992); In re Missionary Baptist Foundation, Inc., 712 F.2d 206, 209 (5th Cir. 1983).

III. Discussion

A. Bankruptcy Exemption Statute:

McVay is a judgment creditor seeking to enforce a judgment lien. The bankruptcy exemption statute, 11 U.S.C. §522(f)(1), entitles the debtor to avoid the fixing of a judicial lien on an interest of his exempt property (Texas homestead). In Farrey v. Sanderfoot, 111 S.Ct. 1825 (1991), the Supreme Court held that

a debtor cannot use § 522(f)(1) to avoid a lien on an interest acquired after the lien attached. Therefore, the critical inquiry is whether the debtor ever possessed the interest to which the lien fixed, before it fixed. If he did, §522(f)(1) permits the debtor to avoid the fixing of the lien on that interest.

Parrish acquired his property through inheritance in 1983. From that point forward, it was his separate property. The fact that it was later improved using community funds does not change the character of the property. Under the inception of title rule, the character of property is fixed upon the inception of title. Parrish clearly had an interest in the property prior to the fixing of the lien; therefore, he can avoid the fixing of the lien on that interest.

B. Texas Law:

The Texas Supreme Court decision in Heggen v. Pemelton, 836 S.W.2d 145 (Tex. 1992), also controls the disposition of this case. Although this decision was not yet final at the time of Judge Kelly's Order, it has now become final. In Pemelton, Charlotte Heggen and Billy Gene Pemelton were married in 1960. In 1965, they settled on a 32-acre ranch owned by Ms. Heggen's parents,

who later deeded the tract to Ms. Heggen in 1969. In 1988, Ms. Heggen filed for divorce. As part of the division of property, the court awarded Ms. Heggen the 32-acre separate property homestead, and recognized Mr. Pemelton's right of reimbursement for any homestead improvements made with community funds. The court also ordered Ms. Heggen to pay $150,000 to Mr. Pemelton for his community interest in the homestead and imposed an equitable lien on the homestead in order to enforce the court's judgment.

The Supreme Court recognized that "trial courts may impose equitable liens on one spouse's separate real property to secure the other spouse's right of reimbursement for community improvements to that property." Pemelton at 146. The Court noted, however, the trial courts "may not impress such liens, absent any compensable reimbursement interest, simply to ensure a just and right equitable division." Id.

The Court's holding, however, is much more narrow than the above statements might imply. The Court held that under the Texas Constitution, there are two requirements to properly impress

an equitable lien on a spouse's separate property homestead to secure a non-owner spouse's right of reimbursement. First, the lien must burden the separate real property for reasons relating to securing the non-owner spouse's reimbursement interest, not just to secure a just and right equitable division. Second, the lien must fit into one of the categories allowed by the Texas Constitution; that is, a purchase money lien, a tax lien, or a home improvement lien for which the work and material had been contracted for in writing with the consent of both spouses. Id. at 147-48. Failure to meet these requirements would impermissibly allow the non-owner spouse to foreclose upon the owner spouse's homestead, "a result contrary to the protections plainly afforded homesteads by [the Texas] Constitution." Id. at 148. This result would impermissibly divest the owner spouse of separate real property without sufficient legal basis. Id. The lien in Pemelton failed to meet both parts of this two-part test.

The disputed issue in this case, therefore, is whether the equitable lien imposed by the divorce court against Mr. Parrish's separate real property conformed with the above test. With regard

to the first part of the test, the Court in Pemelton found that the trial court's imposition of an equitable lien on Ms. Heggen's separate real property was simply an attempt to impose a just and right equitable division; no serious reimbursement claim was asserted. Id. at 146. This is not true in this case, where a jury found that community funds were used to enhance the value of Mr. Parrish's separate real property. Therefore, this Court is of the opinion that the first part of the test has been satisfied; the lien burdened the separate real property for reasons relating to securing Ms. McVay's reimbursement interest, not just to secure her a just and right equitable division.

With regard to the second part of the test, the Pemelton court determined that the lien in question did not fit into any of the three enunciated categories. Id. at 148. Judge Kelly came to the same conclusion in this case. The Appellee argues in his Brief to this Court that the lien against his homestead is invalid because there is no evidence that Parrish pledged the property to McVay as security for purchase money, or that he executed a lien to her for

work and materials used in constructing improvements, contracted in writing, with the consent of both spouses.

The Appellant argues that the lien meets both the purchase money and improvement lien categories of the Constitutional test. Moreover, she asserts that "because the parties chose to use community 'cash' to pay for the construction of their home, there was no legal requirement to 'contract in writing' for the work and material." Appellant's Brief at 6. She further argues that Judge Kelly's construction of Pemelton is totally misplaced, and "would require the Parrishes to enter into a fraudulent mechanic's and materialmen's lien contract with a 'straw man' contractor in order to create a fictitious contractual lien to protect McVay's rights of reimbursement, even though they borrowed no money to purchase materials or to construct improvements on the unimproved real estate." Appellant's Brief at 7. Appellant's argument is totally misplaced. As pointed out in her own Brief, the mechanic's and materialmen's lien is intended to protect the priority and validity of a contractor's lien on an owner's homestead, not the potential lien of a divorcing spouse. Therefore, the strictures enunciated in

Pemelton were not intended to include this type of lien. The sole fact that the community funds were used to build a house on the separate real property does not equate in any way to a home improvement lien. Accordingly, this Court is of the opinion that Judge Kelly's construction of the Pemelton case was correct.

IV. Conclusion

Upon careful consideration, the Court is of the opinion that Judge Kelly's decision in the bankruptcy proceeding below was correct and should be affirmed. Accordingly, it is

ORDERED that Judge Kelly's Memorandum Opinion in Bankruptcy Case No. 91-60631-LK is **AFFIRMED** in all respects consistent with this opinion. It is further

ORDERED that this case be **REMANDED** to the bankruptcy court for further proceedings not inconsistent with this opinion.

SIGNED this 28th day of December, 1992.

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

In re:

SAMUEL RAY PARRISH,

Debtor

CASE NO. 91-60631-LK

SAMUEL RAY PARRISH,

Plaintiff

v.

SHARMAN RAE McVAY,

Defendant

ADVERSARY NO. 91-6061

In the United States Bankruptcy Court

for the Western District of Texas,

Waco Division

Decided August 24, 1992

MEMORANDUM OPINION

Came on to be tried the above-styled Adversary Proceeding. The parties appeared in person and were represented by counsel. After considering the argument of the parties, the court took the

matter under advisement in order to review the materials which were submitted to it. This is a core proceeding within the meaning of 28 U.S.C. §157(b)(2)(K) and 11 U.S.C. §522(f)(1). The following constitute the court's Findings of Fact and Conclusions of Law as required by Bankruptcy Rule 7052.

Background Facts

Samuel Ray Parrish ("Debtor") filed this Adversary Proceeding originally seeking to avoid a lien on his homestead held by Sharman Rae McVay ("McVay"), his former wife. His original complaint also requested that the court determine whether or not the debt secured by the lien owed was dischargeable and further requested that the court determine whether or not a transfer of a 2.93% interest in his "retirement benefits" could be avoided. At trial, the Debtor withdrew any request that the transfer of the 2.93% of his "retirement benefits" be avoided and no party raised the issue of the dischargeability of the underlying claim of Ms. McVay against the Debtor. Apparently the parties have concluded that it is, in fact, dischargeable. During the marriage of these parties, Mr. Parrish received approximately $247,000.00 in a lump

sum from his employer upon early termination of employment and a substantial portion of those funds were used to construct a house on separate real property of the Debtor in which the parties dwelled. In the divorce proceeding, the trial court granted the divorce, determined that the $247,000.00 was community property, determined that a substantial amount of it had been used to improve "separate property" of the Debtor and imposed an equitable lien on the separate property in favor of Ms. McVay for the principal sum of $76,500.00 plus her reasonable attorney's fees which the court found to be $10,000.00. The primary issue before this court is to determine whether or not the equitable lien imposed on the separate property of the Debtor can be avoided as a judgment lien under 11 U.S.C. §522(f).

Findings of Fact

There are no material facts which are in dispute in this case. The parties presented the court with an Amended Agreed Pretrial Order which presented the following "agreed facts":

1. Plaintiff ("Debtor") and Defendant ("McVay") were divorced by final decree of divorce signed on March 21, 1991, by the 87th

District Court of Freestone County, Texas, following a jury trial ("divorce decree").

2. The parties had been married 9 years.

3. During the marriage the Debtor received $247,878.00 in a lump sum early termination benefit from the Sun Company.

4. At the divorce trial, the jury found that the early termination benefit was not a part of the Debtor's retirement benefits, but rather community property.

5. The early termination benefit community property was used by the parties to build a home on raw land which Debtor had inherited during the marriage ("the property").

6. The parties lived on the property as their homestead prior to their divorce.

7. The divorce decree divided the community estate by awarding the property to the Debtor and granting the Defendant a lien on the property to secure a $76,500.00 community reimbursement by the Debtor to the Defendant for improvements made to the property.

8. The Debtor claimed the property as exempt in his Chapter 7 bankruptcy case.

Additional facts which were really not disputed but formed no part of the "agreed facts" are found by this court as follows:

9. The property at issue represented separate property of the Debtor at all times relevant to this proceeding.

10. The property awarded to the Debtor represented the Debtor's homestead at all times relevant to the proceedings before the court.

11. The divorce decree specifically decreed that "Sharman Rae Parrish, Petitioner, recover of and from Samuel R. Parrish, Respondent, judgment for $76,500.00, representing Petitioners one-half (1/2) interest in *community reimbursement for improvements* made to Respondent's separate property and a judgment for $10,000.00 for attorney's fees herein awarded to Petitioner against Respondent; said total judgment of $86,500.00 to be paid together with judgment interest thereon at the rate of 8% per annum and payable in 144 monthly installments of $936.32 per month beginning on April 1, 1991, and a like payment due and

payable on the 1st day of each month thereafter until the sum of $86,500.00 is paid in full, for which let execution issue. *This judgment is part of the division of the community property between the parties and shall not constitute or be interpreted to be any form of spousal support, alimony or child support.*" (emphasis added)

This court finds that no part of the $76,500.00 or $10,000.00 in attorney fees represents any form of spousal support, alimony or child support.

12. The divorce decree went on to grant an "equitable lien" against the real property owned by the Debtor and then "confirmed" that such real property was the separate property of Samuel R. Parrish, although it was stated to be "subject to the equitable lien of the petitioner, Sharman Rae Parrish."

Statement of the Legal issue Presented

The parties advised the court that the only issue being litigated was whether or not 11 U.S.C. §522(f)(1) allows the Debtor to avoid his exspouse's judgment lien. Each referred this court to the U. S. Supreme Court's recent decision in *Farrey v. Sanderfoot*,

111 S.Ct. 1825, __ U.S. ___, 114 L.Ed.2d 337, (1991), and to *In re Finch*, 130 B.R. 753 (S.D.Tex.1991).

DISCUSSION

A. General Principles

The general rules are not in dispute. When Debtors use state law to claim exemptions, the bankruptcy court must turn to state law to interpret their exemption rights in homesteads. *Butner v. United States*, 440 U.S. 48, 50; 90 S.Ct. 914, 915, 59 L.Ed.2d 136 (1979).

In order to understand the effect of the "equitable lien" imposed by the state court in the divorce decree, one must first understand the concept which authorized the imposition of same. There are a number of factual contexts under which reimbursement between a separate property estate and a marital community property estate may arise. See generally, Fred C. Weekley, Reimbursement Between Separate and Community Estates--The Current Texas View, 39 Baylor L. Rev. 945 (1987). Our discussion is limited to situations where the community estate funds are used to improve separate property of one of the spouses and a claim for

reimbursement is made. When reimbursement is allowed the measure of reimbursement is the "enhanced value" to the property improved. *Anderson v. Gilliland*, 684 S.W. 2d 673 (Tex. 1985).

The nature of this right is also clearly equitable as opposed to legal. See, *e.g.*, *Burgon v. Bell*, 380 S.W.2d 561(Tex. 1964) ("The charge or equity which one estate has against the opposite estate for reimbursement of all funds spent in enhancing the value of such opposite estate is *only a claim for money in return of funds and not a right, title, or interest in the land.*" (Citations omitted) (emphasis added); *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982) ("rule of reimbursement is purely equitable and obtains when community estate in some way improves separate estate of one of spouses, or vice versa; right of reimbursement of separate or community estate is not interest in property or enforceable debt, *per se*, but equitable right which arises upon dissolution of marriage through death, divorce or annulment; reimbursement of community or separate estate is not available as a matter of law, but lies within discretion of court."); *Cook v. Cook*, 665 S.W.2d 161 (Tex.App.--Fort Worth 1983, writ ref'd n.r.e.) ("reimbursement to marital estate for funds

advanced to improve another marital estate is not based upon acquisition of title interest in either underlying realty or improvements, but rather is based upon equitable principles and award of reimbursement simply creates obligation to pay for enhancement in value attributable to improvements, which obligation in no way deprives the estate of its title interest in either underlying realty or improvements thereon and does not constitute impermissible divestiture of separate property"); *Smith v. Smith*, 715 S.W.2d 154 (Tex.App.--Texarkana 1986) no writ ("the right to reimbursement is in equity; a mathematical certainty in its determination is not required."); *Kamel v. Kamel*, 760 S.W.2d 677, (Tex.App.--Tyler 1988), writ den. ("community is entitled, upon dissolution of marriage, to reimbursement in amount of resulting enhanced value of separate property, where community funds are used to make improvements to separate property of one spouse); *Magill v. Magill*, 816 S.W.2d 530, (Tex.App.--Hous [1st Dist] 1991) no writ ("reimbursement is equitable claim in dissolution proceeding").

One other important principle in Texas is the rule that a spouse must not be divested of his or her separate real property upon divorce. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977).

In some cases, however, it has been argued that an equitable lien can be imposed on separate real property to reimburse the community for funds of the community that were used to enhance that separate property. See, *e.g., Smith v. Smith*, supra (although no lien was allowed on separate property homestead) and *Kamel v. Kamel*, supra (okay to give lien on separate property homestead where community funds used to make improvement thereon).

B. Current Case Law

Whether or not an equitable lien can be an enforceable lien on a spouse's separate property homestead is still not settled however. See Fred C. Weekley, Reimbursement Between Separate and Community Estates--The Current Texas View, 39 Baylor L.Rev. 945(1987).

In a recent opinion, *Pemelton v. Pemelton*, 809 S.W.2d 642 (Tex.App.--Corpus Christi, 1991) writ granted, the Court of Civil

Appeals had a suit for characterization of property and division of the community assets pursuant to divorce. In relevant part, a lien was granted to Mr. Pemelton to "equalize division of the community estate." The equitable lien was granted against Ms. Pemelton's separate property for "his interest in the homestead." The evidence indicated that the community was due reimbursement from improvements made to her separate property. The Court of Appeals found that each party had a homestead interest which vested independent of fee interest in the realty. Because Mr. Pemelton was divested of his "independent" homestead interest the Appellate Court found that the trial court was authorized to grant him an equitable lien to secure payment of the amount awarded to him for his interest.

The Texas Supreme Court granted writ of error and has recently rendered an opinion which may be found at 1992 WL 140838. The opinion itself, however, has not been released for publication and therefore is not at this point authority for any of the legal principles presented therein. However, it does propose to reverse the Court of Appeals, and to hold that "a judgment

awarded to one spouse cannot be secured by a lien on the other spouse's separate property homestead unless the amount covers reimbursement for improvements made by the community to the separate property." It then indicates that the equitable lien for improvements might be imposed if all the requirements of the Texas Constitution were met, *i.e.*, indicating that if the work and material used in constructing improvements was contracted for in writing, with consent and signature of both spouses. This pending opinion of the Texas Supreme Court, not having been released for publication, does not yet resolve the issue. However, it does indicate that the lien in this case is not necessarily enforceable, whether or not it is avoided by Code §522(f)(1).

See also, *Jensen v. Jensen*, 665 S.W.2d 107(Tex. 1984). In *Jensen* the Supreme Court was faced with a divorce proceeding and division of property, primarily consisting of stock, which was owned by one spouse before marriage but which had increased in value substantially during the marriage. Ultimately, the court determined that reimbursement might be owed to the community and remanded the case for a determination of the amount, if any. It

did, however, specifically rule that "if the right to reimbursement is proved, a lien shall not attach to Mr. Jensen's separate property shares. Rather, a money judgment may be awarded." *Jensen*, supra at 110. Commentators have speculated that decision may indicate that equitable liens cannot be imposed on separate property of one spouse to reimburse the community for community funds advanced to improve it. Fred C. Weekley, Reimbursement Between Separate and Community Estates--The Current Texas View, 39 Baylor L.Rev. 945, (1987). The pending Pemelton decision would seem to follow that thought, unless the lien meets the requirements for other enforceable liens which are set out in the Texas Constitution.

It is undisputed that at all times relevant to this proceeding, Mr. Parrish owned 100% of the title to the real property at issue and that at all times it was his separate property. The law shows that Ms. McVay's "claim" is an equitable claim and not any form of an interest in the separate real property of Mr. Parish. The facts demonstrate that this "equitable claim" was reduced to a judgment in the divorce decree and granted to Ms. McVay as a part of the equitable determination that reimbursement in some amount should

be awarded to the community estate. As an award to the community estate it then was divided in the divorce decree with one half of the reimbursement being reduced to judgment in favor of Ms. McVay and an "equitable lien" then being imposed by judgment upon the Debtor's separate property homestead.

Ms. McVay's reliance on *Farrey v. Sanderfoot*, as requiring this court to rule in her favor, appears to be misplaced. The Supreme Court therein specifically found that under Wisconsin law both spouses had an undivided joint tenancy in the land during the marriage, that this joint tenancy terminated on divorce and that new separate property interests were then created for both parties. As such, the lien awarded to the spouse not acquiring the new property interests did not attach to the acquiring spouse's previous one-half joint tenancy interest, but to the acquiring spouse's "new" fee simple interest. Id., 111 S.Ct. at 1831.

A similar determination was made by the U. S. District Court in the recent case of *In re Finch*, 130 B.R. 753, (S.D. Tex. 1991). In *Finch*, the court compared the Wisconsin law, as reported in *Farrey v. Sanderfoot*, with Texas community property

law. The property being divided in Finch was all community property. The court found that community interests also do not survive divorce. If the property is not divided, then the ex-spouses become tenants in common. If it is divided, then the acquiring spouse's one-half community interest is divested and is revested with a fee simple ownership. Thus, the court imposed equitable lien, like in *Farrey v. Sanderfoot*, was not imposed on the acquiring spouse's pre-existing interest, but on his contemporaneously acquired fee simple interest. As such, the lien was held to be enforceable and immune from avoidance under 11 U.S.C. §522(f)(1). Finch, at 757.

CONCLUSION

In stark contrast to *Farrey v. Sanderfoot*, supra and *In re Finch*, are the facts in the current case. 11 U.S.C. §101(36) defines "judicial lien" to mean a "lien obtained by judgment, levy, sequestration, or other legal or other equitable process or proceeding." The lien granted to Ms. McVay in the divorce decree is such a judicial lien granted to secure her equitable claim. The Debtor's interest in the separate property made the subject of this

proceeding, however, was owned by him at all times prior to the institution of the divorce as his separate property and subsequent to the divorce as his separate property. As such, the judgment lien granted to Ms. McVay in the divorce decree represents the fixing of a lien on a pre-existing interest of the Debtor in property and impairs an exemption to which he would have been entitled under 11 U.S.C. §522(b). As such it is not immune to avoidance.

This court is not certain from state law whether the judgment lien is enforceable against the separate real property homestead of the Debtor. However, under the current state of Texas law, if it did attach, it is clear to the court that it is avoidable under 11 U.S.C. §522(f)(1).

A separate order of even date herewith will be executed by the court to effectuate its Finding of Facts and Conclusions of Law.

SIGNED this 24th day of August, 1992.

Larry E. Kelly

Chief United States Bankruptcy Judge

11 U.S.C. §522(f)(1)

"(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--

(1) a judicial lien; or....."

STATEMENT OF CURRENT INCOME AND EXPENSES

1. CURRENT INCOME ANALYSIS.		Debtor
a.	Current pay periods are:	None
b.	Gross wages per pay period are:	0.00
c.	Payroll deductions per pay period are:	
	Payroll taxes	0.00
	Medical insurance	0.00
	Credit Union	0.00
	Retirement	0.00
	Life insurance	0.00
d.	Take-home pay per period:	0.00
e.	Is your employment subject to seasonal change?	No
f.	Gross income for last calendar year:	0.00

2. CURRENTLY MONTHLY INCOME:

From debtor's principal employment	0.00
Retirement Benefits	1,876.00
City of Wortham	250.00
Son, Timothy J. Parrish	162.00
Total	$ 2,288.00

3. CURRENTLY MONTHLY EXPENSES:

(1)	Rent or Mortgage payment(s)	0.00

(2)	Utilities:		
	Electric	200.00	
	Phone	100.00	
	Heat	0.00	
	Water	50.00	
	Other	50.00	
		Total Utilities	400.00
(3)	Food		325.00
(4)	Clothing		75.00
(5)	Laundry & drycleaning		50.00
(6)	Newspapers, periodicals & books		25.00
(7)	Medical & drug expenses		75.00
(8)	Insurance: Auto		123.00
	Other		239.00
(9)	Transportation		175.00
(10)	Recreation		50.00
(11)	Dues, union, professional, social or otherwise		0.00
(12)	Taxes: Personal property		413.00
	Other		0.00
(13)	Alimony, maintenance or support		0.00
(14)	Other payments for support of dependents not living at home		0.00
(15)	Religious & charitable contributions		0.00
(16)	Auto payments		219.00
	Total Estimated Future Monthly Expenses:		$ 2,169.00
c.	Excess of income over expenses		$ 119.00

UNSWORN DECLARATION UNDER PENALTY OF PERJURY

I, Samuel Ray Parrish, declare under penalty of perjury that I have read the answers contained in the foregoing statement, and that they are true and correct to the best of my knowledge, information, and belief.

Executed on 6/13/91.

(Original signed by Samuel R. Parrish
Signature of Debtor

SUMMARY OF DEBTS AND PROPERTY

(From the statements of the debtor in Schedules A and B)

Schedule		Total
DEBTS:		
A-1/a,b	Wages, etc. having priority	None
A-1/c	Deposits of money	None
A-1/d(1)	Taxes owing United States	None
A-1/d(2)	Taxes owing states	None
A-1/d(3)	Taxes owing other taxing authorities	None
A-2	Secured claims	12,635.00
A-3	Unsecured claims without priority	91,414.00
	Schedule A Total:	$ 104,049.00
PROPERTY:		
B-1	Real Property (total value)	211,000.00
B-2/a	Cash on hand	None
B-2/b	Deposits	None
B-2/c	Household goods	5,195.00
B-2/d	Books, pictures, and collections .	None
B-2/e	Wearing apparel and personal possessions	785.00
B-2/f	Automobiles and other vehicles .	7,081.00
B-2/g	Boats, motors, an accessories . . .	None
B-2/h	Livestock and other animals	4,500.00
B-2/i	Farming supplies and implements	None
B-2/j	Office equipment and supplies . .	None
B-2/k	Machinery, equipment & supplies used in business	None
B-2/l	Inventory	None
B-2/m	Other tangible personal property	None
B-2/n	Patents and other general intangibles	None

B-2/o	Bonds and other instruments	None
B-2/p	Other liquidated debts	None
B-2/q	Contingent and unliquidated claims	None
B-2/r	Interests in insurance policies	None
B-2/s	Annuities	None
B-2/t	Interests in corporations and unincorporated companies	570.00
B-2/u	Interests in partnerships	None
B-2/v	Equitable & future interests, rights & Powers in personalty	None
B-3/a	Property assigned for benefit of creditors	None
B-3/b	Property not otherwise scheduled .	1,876.00
	Schedule B Total	$231,007.00

UNSWORN DECLARATION UNDER PENALTY OF PERJURY

I, Samuel Ray Parrish, declare under penalty of perjury that I have read the foregoing schedules, consisting of _____ sheets, and that they are true and correct to the best of my knowledge, information and belief.

Executed on 6/12/91.

(Original signed by Samuel Ray Parrish)
Signature

Supreme Court, U.S.
FILED
MAR 4 1994
OFFICE OF THE CLERK

No. 93-1304

In The

Supreme Court of the United States

October Term, 1993

SHARMAN RAE McVAY,

Petitioner,

v.

SAMUEL RAY PARRISH

Respondent

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT SAMUEL RAY PARRISH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Suite 800. LB-24
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(817) 861-5500

Counsel for Respondent

34 pp

QUESTIONS PRESENTED

The questions presented are: (1) whether §522(f) of the Bankruptcy Code allows a debtor to avoid the fixing of a lien on exempt property, inherited by him as his separate property during his marriage, where the lien is granted to the debtor's former spouse in a divorce decree; and (2) whether the former spouse's lien is invalid, in any event, because it does not fit any of the express exceptions to the Texas constitutional prohibition against liens against homesteads.

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No. 93-1304

In The

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SHARMAN RAE McVAY,

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v.

SAMUEL RAY PARRISH

Respondent

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To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT SAMUEL RAY PARRISH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Samuel Ray Parrish respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

OPINIONS BELOW

Petitioner's Appendices set forth the relevant opinions of the courts below, with the exception of the parties' Divorce Decree, which is attached hereto as Appendix G.

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STATUTES AND RULES INVOLVED

11 U.S.C. §522(f)(1) states, in pertinent part, as follows:

> "[T]he debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled . . ., if such lien is . . . a judicial lien . . ."

Art. 16, §50 of the Texas Constitution provides, in pertinent part, that:

> "The homestead of a family shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing . . .No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided . . ."

§5.01 (a)(1) of the Texas Family Code provides, in pertinent part, that:

> "A spouse's separate property consists of:
>
> (1) the property owned or claimed by the spouse before marriage;

(2) the property acquired by the spouse during marriage by gift, devise, or descent; . . ."

∞∞∞

STATEMENT OF THE CASE

Petitioner, Sharman Rae McVay ("McVay") was granted a divorce from Respondent, Samuel Ray Parrish ("Parrish") on March 21, 1991. Parrish filed for Chapter 7 bankruptcy relief on May 29, 1991, and thereafter filed the underlying complaint to determine the dischargeability of a judgment lien created in the divorce decree. A copy of the divorce decree was in evidence before the Bankruptcy Judge, and is attached hereto as Appendix "G"

Facts. The parties were married March 6, 1982. Mr. Parrish's mother died on March 6, 1983, and he inherited the real property that is the subject of this litigation. A house was then constructed on Mr. Parrish's inherited land. Texas is a community property state. The divorce decree included a judgment in McVay's favor against Parrish for $76,500.00, representing half of the reimbursement to the community estate for improvements made to Parrish's inherited land. The money judgment in McVay's favor was secured by an equitable lien imposed in the decree against Parrish's land. (Appendix G) The divorce decree confirmed the inherited land to be Parrish's separate property. It made no reference to either party's homestead rights. (Appendix G)

Misstatements in Petitioner's Statement of the Case.

1. Petitioner incorrectly states as fact that McVay's judgment lien was "valid." (p.4 Petition for Writ of Certiorari) Respondent, the Bankruptcy Court and the District Court assert

that it was invalid under the Texas Constitution. (Appendices B 4-9; C 16)

2. Petitioner incorrectly states as fact that Parrish was granted "a new fee simple ownership to the property and improvements" by the divorce decree. (p.5 Petition for Writ of Certiorari) This is a conclusion of law, which is disputed by Respondent, and which is contrary to the written opinions of all of the courts below. (Appendices B, C).

3. Petitioner states as fact that Parrish had the ability to satisfy all his debts when he filed his bankruptcy petition. This is a claim : (i) made here for the first time by Petitioner; (ii) which is an impermissible collateral attack on the Bankruptcy Court's Discharge of Debtor; and (iii) which is irrelevant to Petitioner's claim that the judgment lien attached after Parrish first acquired fee simple ownership of the property; and (iv) which is not supported by the bankruptcy schedules.

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SUMMARY OF THE ARGUMENT

1. The judgment lien was properly avoided, because Parrish acquired his interest in the property before the lien attached.

2. The judgment lien was properly avoided, because it was invalid under the Texas Constitution.

∞∞∞

REASONS FOR DENYING THE WRIT

I. Parrish Possessed His Interest in the Property Prior to the Fixing of McVay's Judicial Lien.

The Fifth Circuit Court of Appeals correctly ruled that the equitable lien imposed in the Texas divorce decree was avoid-

able by the Bankruptcy Court as a judgment lien, because Parrish acquired the 23.15 acre tract from his mother before the divorce decree was entered. The bankruptcy exemption statute, 11 U.S.C. §522(f)(1), entitles a debtor to avoid the fixing of a judicial lien on his exempt property [Texas homestead]. This case is controlled by *Farrey v. Sanderfoot,* ___ U. S. __, 111 S.Ct. 1825, 114 L.Ed. 2d 337 (1991). Congress enacted §522 with the broad purpose of protecting the debtor's exempt property. *id.* at 1829. In the Bankruptcy Reform Act of 1978, Congress revised the law to permit the debtor to avoid the affixing of some liens. §522(f)(1), by its terms, extends this protection to cases involving judicial liens on exempt property. *id.* at 1829. This Court held in *Farrey* that a debtor cannot use §522(f)(1) to avoid a lien on an interest acquired after the lien attached. *id.* at 1830. Therefore, the critical inquiry is whether the debtor ever possessed the interest to which the lien fixed, before it fixed. If he did, §522(f)(1) permits the debtor to avoid the fixing of the lien on that interest. *id.* at 1830.

Whether the debtor possessed an interest to which the lien fixed, before it fixed, is a question of state law in a divorce matter. *id.* at 1830. In the *Farrey* case, the parties were divorced in Wisconsin. Under Wisconsin law the husband and wife held title to the real estate in joint tenancy, each possessing an undivided one-half interest. Their divorce decree extinguished these previous interests and created new interests in place of the old. The debtor obtained fee simple ownership in the real estate, and his spouse received other assets and a money judgment against the debtor, secured by a lien on his new fee simple interest. *id.* at 1830. This Court held that the

lien could not have fixed on Mr. Sanderfoot's preexisting undivided one-half interest, because the divorce decree extinguished it. Instead, the only interest that the lien encumbered was the debtor's wholly new fee simple interest. The same decree that awarded the debtor his fee simple interest simultaneously granted the lien to his spouse. The debtor took the interest and the lien together, as if he had purchased an already encumbered estate from a third party. *id.* at 1830. This Court held that, since the debtor never possessed his new fee simple interest before the lien "fixed", §522(f)(1) was not available to void the lien. *id.* at 1831.

Parrish's situation is distinguishable from that of the debtor in *Farrey*. Parrish acquired his separate property interest during the marriage through inheritance in 1983. As a matter of law, it was his separate property from that point forward. Tex. Fam. C. §5.02 (a)(2); *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977). His spouse acquired no property rights in the inheritance. Under Texas law, once the character of property is determined, as of the time of inception of title, the character is fixed. The character is not affected if at a later time the property is improved by funds of a different character, even though the contributing estate may be entitled to reimbursement from the benefited estate upon the dissolution of the marriage. *Day v. Day*, 610 S.W.2d 195 (Tex. App. - Tyler 1980, n.r.e.). The subsequent use of community funds to enhance separate property merely creates a claim for money in equity, that is not a right, title, or interest in the land. *Burton v. Bell*, 380 S.W.2d 561, 564 (Tex. 1964); *Anderson v. Gilliland*, 624 S.W.2d 243 (Tex. App. - Dallas 1981, n.r.e.).

McVay claims that Parrish's separate property inheritance does not distinguish this case from *Farrey v. Sanderfoot,* because (supposedly) in both, the husband's interest in the property was created by the divorce decree, giving him property rights that he did not already possess. But Mr. Parrish owned the land as his fee simple separate property when it was inherited from his mother. The Texas trial court could not have divested him of his fee title to his separate property as a matter of law. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977).

> "Trial courts have a broad latitude in the division of the marital community property, but that discretion does not extend to the taking of the fee to the separate property of the one and its donation to the other." *id.* at 142.

McVay also cites *Farrey* for the proposition that the purpose of § 522(f)(1) is thwarted by allowing her former spouse to avoid the lien imposed against his property in the divorce decree. (p.15, Petition for Writ of Certiorari) Unlike *Farrey*, McVay did not have a pre-existing interest in the property that was "fully equal to that of her spouse". *Farrey supra.* at 1831 In *Farrey* the property was akin to Texas community property, owned equally by both marital partners prior to the divorce[1]. But Parrish's land became his separate property as soon as he

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[1] Prior to the divorce judgment, Farrey and her husband held title to the property in joint tenancy, each possessing an undivded one-half interest. *Farrey v. Sanderfoot, supra.* at 1830.

inherited it. Tex. Fam. C. §5.01. McVay, unlike the creditor spouse in *Farrey*, was not being protected for loss of her one-half interest in the property by the divorce decree lien. McVay's lien was imposed for a debt, reimbursement for money spent on improving her husband's separate property. *Burton v. Bell*, 380 S.W.2d 561, 564 (Tex. 1964); *Anderson v. Gilliland*, 624 S.W.2d 243 (Tex. App. - Dallas 1981, n.r.e.). McVay is no different than any other judgment creditor seeking to enforce a lien against property protected by the bankruptcy exemption statute. 11 U.S.C. §522(f)(1); (Appendix B 3).

Texas Homestead and Reimbursement Rights. Petitioner misconstrues the nature of Texas homestead and reimbursement rights, citing the Texas Court of Appeals decision in *Pemelton v. Pemelton*, 809 S.W.2d 642 (Tex. App. - Corpus Christi 1991), *reversed*, 836 S.W.2d 145 (Tex. 1992). Petitioner did not provide this Court with the case's full citation, which would have shown that it was reversed by the Texas Supreme Court. The lower court opinion was criticized on this very point:

> "Finally, the Court of Appeals erred [in *Pemelton v. Pemelton*] in its constitutional analysis of the trial court's judgment by confusing the 'right of reimbursement' with the 'homestead interest.'....The homestead interest is a legal interest created by the [Texas] Constitution that provides prophylactic protection from all but the three types of constitutionally permitted liens against homesteads. This interest, unlike the right of reimbursement,

> gives protective legal security rather than vested economic rights." *Heggen v. Pemelton*, 836 S.W.2d 145, 148 (Tex. 1992) (emphasis added).

The Texas divorce decree did not award to Parrish any interest in the land that he did not already possess. McVay never had an ownership interest in Parrish's separate property. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977) Since the marriage ended by virtue of the divorce decree, she had no ongoing homestead to protect from forced sale. TEX. CONST. Art. 16, §50

There was no new estate created in Parrish by the divorce decree. In fact, the decree merely "confirmed" his previous separate property ownership of the inherited land. (Appendix G 10) Parrish's homestead right after the divorce was by virtue of his continued use of his inherited land as his home. TEX. CONST. art. 16, §50

Under Texas law the community estate's reimbursement right was not a right, title or interest in property. The Texas Supreme Court held in *Burton v. Bell, supra.* that no matured right of equitable reimbursement for community expenditures on separate property arises until dissolution of the community. It is an equitable right that may be considered at the time of divorce, not an interest in property. *Jones v. Jones*, 804 S.W.2d 623 (Tex. App. - Texarkana 1991, no writ)

Judicial Lien Against Former Community Property is Not Voidable. A federal district court in Texas has applied the *Farrey* decision to a situation where the debtor was attempting to avoid a judicial lien against his homestead created in a di-

vorce decree out of community property. *In re Finch*, 130 B.R. 753 (S.D. Tex. 1991). Although the case is distinguishable, it is still a good example of proper application of the *Farrey v. Sanderfoot* holding to judicial liens created in Texas divorce proceedings. *In re Finch* affirmed the Bankruptcy Court's decision not to avoid a lien created in a divorce decree, because community property was converted into the debtor's fee simple property by the divorce decree. The District Court noted that the lien, awarded to the non-acquiring spouse in the divorce decree, did not attach to the acquiring spouse's previous one-half community interest, but to the acquiring spouse's new fee simple interest. *id.* at 756. In our case, Parrish's separate property interest existed prior to the divorce. He acquired no new interest from the divorce decree.

The District Court in *Finch* explained how an equitable lien attaches to separate property that is created out of community property in a Texas divorce:

> "... the acquiring spouse's undivided one-half community interest is divested, and he or she is revested with fee simple ownership - that is, the trial court terminates the acquiring spouse's joint undivided interest and grants him or her sole and separate ownership." *In re Finch, supra.* at 756.

Thus, the *Finch* Court would have reached the opposite result in this case. Here, Parrish owned the subject land in fee simple as his separate property from the time of its inheritance. The parties were not divested of any community property interest in

the divorce decree, and Parrish was not revested with a new fee simple ownership.

II. McVay Asserted an Invalid Lien.

The Court of Appeals for the Fifth Circuit affirmed the judgments of the District Court and the Bankruptcy Court, which both held that this case is also controlled by *Heggen v. Pemelton*, 836 S.W.2d 145, 148 (Tex. 1992). (Appendices B 4, C 11,12) The Texas Supreme Court announced in *Heggen* the rules for imposition of an equitable lien against separate property homestead in a divorce decree. They include the rule that a lien against the other spouse's separate property homestead, regardless of how it is imposed, is not enforceable unless it fits into the categories allowed by the Texas Constitution. The Texas Supreme Court held that the court imposed equitable lien against the homestead in the *Heggen* case was invalid for this reason; that is, it was not a tax lien, a purchase money lien, or an improvement lien for which "work and material [had been] contracted for in writing, with the consent of both spouses." TEX. CONST. Art. 16 §50; *id* at 148.

Heggen states that a court imposed equitable lien on separate property homestead in Texas must fit into one of the categories allowed by the Texas Constitution:

> "[T]he homestead of a family or a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing im-

> provements thereon, and in this last case, only when the work and material are contracted for in writing, with the consent of both spouses...," TEX. CONST. Art. 16, §50 (1992).

The *Heggen* Court states that unless the Texas constitutional provisions are followed in imposing equitable liens, it could lead to foreclosure of the homestead, a result contrary to the protections plainly afforded homesteads by the Texas Constitution. *Heggen v. Pemelton*, 836 S.W.2d 145, 148 (Tex. 1992).

It is clear that the Petitioner in this case also did not have a valid lien against the homestead. There was no evidence or finding that Parrish pledged the property to McVay as security for purchase money, or that he executed a lien to her in return for work and materials used in constructing improvements, contracted in writing, with the consent of both spouses. (Appendix G)

McVay Misconstrues the Parties' Homestead Rights. McVay has claimed that the equitable lien imposed by the trial court in her divorce decree met both the purchase money and improvement lien categories of the constitutional test. However, Texas authorities do not agree with her. The lien imposed in the divorce decree was not a purchase money lien. The "debt" for purchase money, excepted from the operation of the homestead law, must arise out of the acquisition of some right, title, or interest in the disputed property. It cannot be one founded on a transaction occurring after title has vested and homestead occupancy has commenced. 43 Tex.Jur.3d 512, Homesteads §78. Title vested in Parrish when he inherited the

property from his mother in 1983. The divorce decree did not purport to impose an equitable lien until 1991.

McVay's equitable lien also did not meet the Texas constitutional exception for work and material used in constructing improvements, which are contracted in writing. There was no written contract between Parrish and McVay for her to supply work or materials. The Texas Constitution is very clear that a construction or improvement lien on a homestead is invalid unless created in the manner provided in §50 of article 16. It has long been the law of Texas that its Constitution must be strictly followed to obtain a lien against homestead property. *Collier v. Valley Building and Loan Association*, 62 S.W.2d 82, 84 (Tex. 1933); *Moray Corporation v. Griggs*, 713 S.W.2d 753 (Tex. App. - Houston [1st. Dist.] 1986, writ ref'd).

The District Court below found no merit in the Petitioner's argument that the equitable lien imposed in her divorce decree was sanctioned by the Texas Constitution:

> "... [McVay's] argument is totally misplaced. As pointed out in her own Brief, the mechanic's and materialmen's lien is intended to protect the integrity and validity of a contractor's lien on an owner's homestead, not the potential lien of a divorcing spouse. Therefore, the strictures enunciated in *Pemelton* were not intended to include this type of lien. The sole fact that community funds were used to build a house on the separate real property does not equate in any way to a home improvement lien." (Appendix B 8)

Thus, under the Texas Supreme Court's latest pronouncement of Texas law on this point, McVay did not have a valid or enforceable lien, even if it were not avoided under 11 U.S.C. §522(f)(1).

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CONCLUSION

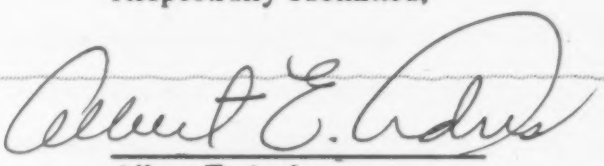
This Petition for Writ of Certiorari should be denied, because:

1. The Court of Appeal's decision does not conflict with *Farrey v. Sanderfoot.*

2. McVay did not have a valid lien against Parrish's homestead, because it did not comply with Article 16, §50 of the Texas Constitution.

3. McVay's judicial lien was properly voided by the bankruptcy judge, because it impaired Parrish's homestead exemption, and was therefore subject to avoidance under 11 U.S.C. §522(f)(1).

Respectfully submitted,



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ATTORNEYS FOR
RESPONDENT

Appendix G

Final Decree of Divorce of
Sharman Rae Parrish and Samuel R. Parrish

87th Judicial District Court
Freestone County, Texas

March 21, 1991

89-333-B

IN THE MATTER OF THE MARRIAGE OF SHARMAN RAE PARRISH AND SAMUEL R. PARRISH	* * * *	IN THE DISTRICT COURT OF FREE-STONE COUNTY, TEXAS, 87TH JUDICIAL DIST.

FINAL DECREE OF DIVORCE

On February 18, 1991, this case came on for hearing.

Petitioner, SHARMAN RAE PARRISH, Social Security Number 461-82-0524, appeared in person and through attorney of record, BARBARA MOE.

Respondent, SAMUEL R. PARRISH (JR.), Social Security Number 452-40-2817, appeared in person and through attorney of record, REED JACKSON and announced ready for trial.

The record testimony was duly reported by KEN TOMLIN.

The Court finds that the pleadings of Petitioner are in due form and contain all the allegations, information, and pre-requisites required by law. The Court, after receiving evidence, finds that it has jurisdiction over this cause of action and the parties and that at least 60 days have elapsed since the date the suit was filed. The Court finds Petitioner has been a domiciliary of this state for at least a six-month period preceding the filing of this action and a resident of the county in which this suit is filed for at least a 90-day period preceding the filing of this action. All persons entitled to citation were properly cited.

A jury was selected, and the following question of fact was submitted to the jury, and a verdict was returned and duly filed:

QUESTION NO. 1

What percentage, if any, of the $247,878.00 received by Samuel R. Parrish at the time of his early termination of employment from the Sun Company was retirement benefits?

You are instructed that an answer of any percentage must be based on clear and convincing evidence. If you do not find that clear and convincing evidence supports a finding of any percentage, then answer zero percent. "CLEAR AND CONVINCING EVIDENCE" means that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the proposition sought to be established.

Answer by stating the appropriate percentage, if any.

ANSWER: $ 0%

All other questions of fact and of law were submitted to the Court.

IT IS ORDERED AND DECREED that SHARMAN RAE PARRISH, Petitioner, is granted a divorce from SAMUEL R. PARRISH, Respondent, and that the marriage between them is dissolved on the grounds of cruel acts by Respondent.

The Court finds that there is no child of the marriage and that none is expected.

The Court finds that the following is a just and right division of the parties' marital estate, having due regard for the rights of each party.

IT IS ORDERED AND DECREED that the estate of the parties is divided as follows:

Petitioner is awarded the following as Petitioner's sole and separate property, and Respondent is divested of all right, title, interest, and claim in and to such property:

1. All household furniture, furnishings, fixtures, goods, appliances, and equipment in the possession of or subject to the control of Petitioner.

2. The following furniture, furnishings, fixtures, goods, appliances and equipment in the possession of Respondent:

a. wooden cabinet in formal dining room;
b. brass trimmed cabinet in formal dining room;
c. blue chair in master bedroom;
d. rocker chair in master bedroom;
e. coffee table in master bedroom;
f. refrigerator in shop;
g. VCR;
h. two Stiffle lamps;
i. brass bed set;
j. wicker bookshelf;
k. electric lawnmower;
l. credenza from Sharman's aunt;
m. Ethan Allen furniture;
n. corner curio cabinet;
o. VHS tapes and case;
p. Sharman's grandfather's painting;

3. Any and all sums of cash in the possession of or subject to the sole control of Petitioner, including money on account in banks, savings institutions, and other financial insti-

tutions, which accounts stand in Petitioner's sole name or from which Petitioner has the sole right to withdraw funds or which are subject to Petitioner's sole control.

4. Moneys on account in the following banks, savings institutions, or other financial institutions:

a. Sun Credit Union savings account, account number 452-40-2817, ($474.00 or balance in account);

b. Merrill Lynch, CMA cash account, account number 586-58154; ($1,257.00 or balance);

5. All clothing, jewelry and other personal effects in the possession of or subject to the sole control of Petitioner.

6. A portion of retirement benefits pursuant to the following provisions:

This Decree of Divorce shall be a "qualified domestic relations order" under Section 414(p) of the Internal Revenue Code. In compliance with that provision, the Court ORDERS and specifies as follows:

a. This qualified domestic relations order assigns a portion of the benefits payable in the Oryx Energy Company Retirement Plan ("the Plan") at P.O. Box 2880, Dallas, Texas 75221, to Sharman Rae Parrish in recognition of the existence of her marital rights in Samuel R. Parrish's retirement benefits as defined by Texas law in Berry v. Berry 647 S.W. 2d 945 (Tex. 1983).

b. Participant in the Plan is Samuel R. Parrish, whose last known mailing address is P.O. Box 637, Wortham, Texas 76693, whose birth date is October 17, 1930, and whose Social Security Number is 452-40-2817.

c. Alternate Payee is Sharman Rae Parrish, whose last known mailing address is P.O. Box 843, Wortham, Texas 76693, whose birth date is September 17, 1947, and whose Social Security Number is 461-82-0524.

d. On the date of this divorce, Participant's present accrued benefit for retirement at normal retirement age under the Plan with a straight life annuity benefit is $2,175.00 per month.

e. As part of a just and right division of the estate of the parties, the Court awards, assigns, and grants to Alternate Payee 2.93% of Participant's present accrued benefit. Alternate Payee shall have the right to elect to receive benefit payments on or after the date on which Participant attains (or would have attained) the "earliest retirement age" as that term is defined by the Internal Revenue Code of 1986, Section 414(p)(4) (but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement). Alternate Payee shall have the right to elect any form of benefits permitted by the Plan as of the date Alternate Payee elects to begin receiving benefits, other than a joint and survivor annuity. If the Plan pays cost-of-living increases at any date after Alternate Payee begins to receive benefits from the Plan, Alternate Payee shall also receive a share of each increase, which share shall be in the proportion that the accrued benefit awarded herein to Alternate Payee (including her share of previous cost-of-living increases hereunder) bears to the total accrued benefit (Alternate Payee's accrued benefit and Participant's accrued benefit) on the date the cost-of-living increase is granted.

f. If Participant elects to retire from the Plan before normal retirement age and by reason of that early retirement the Plan provides an early retirement subsidy, then Alternate Payee's benefit shall be recomputed to provide Alternate Payee with 2.93% of that portion of the subsidy attributable to the total accrued benefit on the date of divorce.

g. If Participant predeceases Alternate Payee, Alternate Payee shall be treated as the surviving spouse of Participant with regard to a share of the survivor benefits to be paid pursuant to the terms of the qualified joint and survivor's annuity provided under the terms of the Plan, calculated in accordance with the terms of this paragraph, and that share shall be paid to Alternate Payee beginning at Participant's death and continuing until Alternate Payee's death. Participant shall elect a form of benefits under the Plan that provides the qualified joint and survivor annuity as set forth under section 417 of the Internal Revenue Code of 1986, as amended. Alternate Payee's share of the survivor benefit shall be 2.93% of the total benefit paid pursuant to the terms of the qualified joint and survivor annuity under the Plan. This award to Alternate Payee shall not preclude the Plan from paying the balance of the survivor benefits payable pursuant to the terms of the qualified joint and survivor annuity under the Plan not awarded to Alternate Payee to Participant's spouse, if any, or other designated beneficiary permissible under the Plan at the time of Participant's death.

h. This qualified domestic relations order shall apply over the life of Alternate Payee. This qualified domestic relations order is not intended to require the Plan to provide any type or form of benefits or any option not otherwise provided

by the Plan, nor shall this order require the Plan to provide for increased benefits (determined on the basis of actuarial value). This qualified domestic relations order does not require the Plan to provide benefits to Alternate Payee that are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

i. The benefits hereby assigned to Alternate Payee shall be paid to Alternate Payee notwithstanding Participant's anticipated continued employment with Oryx Energy Company.

j. All benefits payable under the Oryx Energy Company Retirement Plan other than those awarded herein to Sharman Rae Parrish are awarded to Samuel R. Parrish and shall be payable to him in such manner and form as Samuel R. Parrish may elect in his sole and undivided discretion, subject only to Plan requirements.

k. Sharman Rae Parrish is ORDERED AND DECREED to report any retirement payments received on any applicable income tax return. The pension trustee is authorized to issue a Form W2P on any direct payment made to Sharman Rae Parrish.

l. While it is anticipated that the Plan Administrator will pay directly to Sharman Rae Parrish the benefit awarded to her, Samuel R. Parrish is designated a constructive trustee to the extent he receives any retirement benefits under the Oryx Energy Company Retirement Plan that are due to Sharman Rae Parrish but paid to Samuel R. Parrish. Samuel R. Parrish is ORDERED AND DECREED to pay the benefit

defined above directly to Sharman Rae Parrish within three days after receipt by Samuel R. Parrish.

m. IT IS ORDERED AND DECREED that this Court shall retain jurisdiction of this cause for the purpose of making any clarifying orders that are necessary to proper enforcement of the orders and provisions contained herein and that may be necessary to ensure acceptance of this order as a "qualified domestic relations order" under section 414(p)(a)(A) of the Internal Revenue Code.

7. Any and all policies of life insurance insuring the life of Petitioner.

8. Any and all stocks, bonds, and securities registered in the name of Petitioner, together with all dividends, splits, and other rights and privileges in connection therewith.

9. The following stocks, bonds, and securities together with all the dividends, splits and other rights and privileges therewith:

a. Oryx Energy Company, 19 shares, Certificate Nos. E173120, E122038, C104855, and C135363;

b. Sun Company, Inc., 19 shares, Certificate Nos. C104855 and C135363;

c. San Antonio Partners, 1/2 unit;

d. Merrill Lynch Municipal Bond Fund, Account No. 012-5865-8154, 398.421 shares ($4,030.00 or balance);

e. Merrill Lynch Cash Management Account, Account No. 586-58154 consisting of the following stocks:

1) Wang Labs, Inc., CL B 200 shares;

2) Tandy Corporation, 100 shares;

3) Oryx Energy Company, 100 shares;

4) Sun Company, Inc., 100 shares;

5) Mary Kay Corporation, 1,600 shares.

($7,964.00 or balance)

10. The 1984 Cadillac, vehicle identification number 1G6AM4735E9083510, together with keys, and title documents.

11. For the purpose of the just and right division of the property made in this decree, it is FURTHER ORDERED AND DECREED that SHARMAN RAE PARRISH, Petitioner, recover of and from SAMUEL R. PARRISH, Respondent, judgment for $76,500.00, representing Petitioner's one-half (1/2) interest in community reimbursement for improvements made to Respondent's separate property and a judgment for $10,000.00 for attorney's fees herein awarded to Petitioner against Respondent; said total judgment of $86,500.00 to be paid together with judgment interest thereon at the rate of 8% per annum and payable in 144 monthly installments of $936.32 per month beginning on April 1, 1991, and a like payment due and payable on the 1st day of each month thereafter until the sum of $86,500.00 is paid in full, for which let execution issue. This judgment is part of the division of the community

property between the parties and shall not constitute or be interpreted to be any form of spousal support, alimony or child support.

For the purpose of securing the judgment awarded to Petitioner, SHARMAN RAE PARRISH, for $86,500.00, it is FURTHER ORDERED AND DECREED that Petitioner, SHARMAN RAE PARRISH, is granted an equitable lien against the following described real property:

1. Located in Freestone County, Texas, to-wit:
   BEING 23.15 acres out of the R.B. Longbotham League Survey in Freestone County, Texas..... [Full legal description is in the Petition for Writ of Certiorari]

SHARMAN RAE PARRISH, Petitioner, is granted judgment against SAMUEL R. PARRISH, Respondent, for $10,000.00 for attorney fees, which is a sum stipulated to be reasonable, as heretofore ordered.

Respondent is awarded the following as Respondent's sole and separate property, and Petitioner is hereby divested of all right, title, interest, and claim in and to such property:

1. The following real property is confirmed as the separate property of Respondent, SAMUEL R. PARRISH, subject to the equitable lien of Petitioner, SHARMAN RAE PARRISH:

   a. Located in Freestone County, Texas, to-wit:
      BEING 23.15 acres out of the R.B. Longbotham League Survey in Freestone County, Texas .....

b. 50% interest in and to a 64.36 acre tract out of the Colder Survey, Navarro County, Texas, as more particularly described in an instrument recorded in Volume 1025, page 253, of the Deed Records of Navarro County, Texas.

2. All household furniture, furnishings, fixtures, goods, appliances, and equipment in the possession of or subject to the control of Respondent, save and except those such items herein specifically awarded to Petitioner that are now in the possession of Respondent.

3. All clothing, jewelry, and other personal effects in the possession of or subject to the sole control of Respondent.

4. Moneys on account in the following banks, savings institutions or other financial institutions:

a. First National Bank of Wortham, checking account #1572-800-9 ($1,142.00);

b. First National Bank of Wortham, savings account #823-840-4 ($3,602.00).

5. 97.07% of any and all sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights reltaed (sic) to any profit-sharing plan, retirement plan, pension plan, employee stock option plan, employee savings plan, accrued unpaid bonuses, or other benefit program

existing by reason of Respondent's past, present, or future employment with Oryx Energy Company.

6. Any and all policies of life insurance insuring the life of Respondent.

7. The following stocks, bonds, and securities, together with all dividends, splits, and other rights and privileges in connection therewith:

a. Granada Foods, 60 shares;

b. Granada Bio-Sciences, 20 shares;

8. The 1989 Chevrolet Silverado pickup, vehicle identification number 1GCDC14K0K2219808, together with all prepaid insurance, keys, and title documents.

9. Livestock and farm equipment.

IT IS ORDERED AND DECREED that Petitioner shall pay, as a part of the division of the estate of the parties, the following debts and obligations and shall indemnify and hold Respondent and Respondent's property harmless from any failure to so discharge these debts and obligations:

1. Any and all debts, charges, liabilities, and other obligations incurred solely by Petitioner SHARMAN RAE PARRISH from and after October 5, 1989, unless express provision is made in this decree to the contrary.

IT IS ORDERED AND DECREED that Respondent shall pay, as a part of the division of the estate of the parties, the following debts and obligations and shall indemnify and hold Petitioner and Petitioner's property harmless from any failure to so discharge these debts and obligations:

1. Any and all debts, charges, liabilities, and other obligations incurred solely by Respondent SAMUEL R.

PARRISH from and after October 5, 1989, unless express provision is made in this decree to the contrary.

2. Judgment and equitable lien awarded herein to SHARMAN RAE PARRISH in the amount of $86,500.00, secured by an equitable lien against the separate property of Respondent SAMUEL R. PARRISH.

3. Any mortgage indebtedness against the real property herein confirmed as Respondent's separate property.

IT IS ORDERED AND DECREED that SAMUEL R. PARRISH shall appear in the law offices of Reed Jackson at Fairfield, Texas, on or before 10:00 A.M. on March 28, 1991, and shall execute and have acknowledged and delivered to SHARMAN RAE PARRISH the following instruments:

1. Certificate of title to 1984 Cadillac, motor vehicle identification number 1G6AM0-4735E9-083510;

2. Seller, Donor or Trader's Affidavit;

3. Stock transfer certificate for stock held by Merrill Lynch in Merrill Lynch Cash Management Account; and,

4. 19 shares of Oryx Energy Stock, 19 shares of Sun Company, Inc., Stock, and San Antonio Partners stock, in possession of Respondent with stock transfer certificates.

IT IS ORDERED AND DECREED that SAMUEL R. PARRISH shall deliver possession to SHARMAN RAE PARRISH at 10:00 A.M. on March 28, 1991 at SAMUEL R. PARRISH's residence in Wortham, Texas the following items of personal property:

a. wooden cabinet in formal dining room;

b. brass trimmed cabinet in formal dining room;

c. blue chair in master bedroom;

d. rocker chair in master bedroom;

e. coffee table in master bedroom;

f. refrigerator in shop;

g. VCR;

h. two Stiffle lamps;

i. brass bed set;

j. wicker bookshelf;

k. electric lawnmower;

l. credenza from Sharman's aunt;

m. Ethan Allen furniture;

n. corner curio cabinet;

o. VHS tapes and case;

p. Sharman's grandfather's painting;

IT IS ORDERED AND DECREED that Petitioner's name is changed to SHARMAN RAE McVAY.

Costs of Court are to be borne by the party by whom such costs were incurred.

IT IS FURTHER ORDERED AND DECREED that the temporary injunction imposed by the Temporary Orders of this Court shall survive this judgment and independent enforcement may be sought.

IT IS FURTHER ORDERED AND DECREED that SAMUEL R. PARRISH shall pay to SHARMAN RAE PARRISH $250.00 per month for temporary support pending any appeal taken in this case with the first such payment being

due and payable on the date that is 31 days after the date of entry of this Decree of Divorce and a like payment being due and payable on the same day of each and every month thereafter until 30 days following the entry of a final judgment of the Court of Appeals or, if a writ of error is granted by the Supreme Court of Texas, the entry of a final judgment of the Supreme Court of Texas.

Without affecting the finality of this Decree of Divorce, this Court expressly reserves the right to make orders necessary to clarify and enforce this decree.

IT IS ORDERED AND DECREED that all relief requested in this cause and not expressly granted is denied.

This divorce judicially PRONOUNCED AND RENDERED in open court at Fairfield, Freestone County, Texas, on February 21, 1991, and further noted on the Court's docket sheet on the same date, but ministerially signed and ratified on the 21st day of March, 1991.

_____

JUDGE PRESIDING